

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

Paper No. 9

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte LARRY E. WARD, DEANNA L. WARD,
and KOFI OFOSU-ASANTE

Appeal No. 2000-0520
Application No. 08/956,160

ON BRIEF

Before ABRAMS, FRANKFORT, and MCQUADE, Administrative Patent Judges.

MCQUADE, Administrative Patent Judge.

DECISION ON APPEAL

Larry E. Ward et al. appeal from the final rejection of claims 9 and 10, the only claims pending in the application. We reverse.

THE INVENTION

The invention relates to "balusters used as components for railing assemblies" (specification, page 1). Claim 9 is illustrative and reads as follows:

In a railing assembly including a top rail, a bottom support, and a plurality of hollow plastic balusters having upper and lower ends, a hollow reinforcing tube having an upper end and a lower end extending through the hollow interior of the balusters, and support means mounting the balusters in spaced apart relation between the top rail and bottom support, and retaining the respective ends of the reinforcing tube, the improvements comprising the support means for receiving the upper end of the baluster and including a first support bracket secured to the top rail and including a base portion provided with an aperture, an annular wall surrounding the aperture and extending from the first base portion for receipt of one end of the reinforcing tube; and a second support bracket secured to the bottom support and including a second base portion provided with an aperture, an annular wall surrounding the aperture and extending from the second base portion for receipt of the other end of the reinforcing tube.

THE PRIOR ART

The items relied upon by the examiner as evidence of

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obviousness are:

Katz	5,029,820	Jul. 9,
1991		

The railing assembly set forth in the preamble of appealed claim 9 (the admitted prior art).¹

THE REJECTION

Claims 9 and 10 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over the admitted prior art in view of Katz.

Attention is directed to the appellants' brief (Paper No. 7) and to the examiner's answer (Paper No. 8) for the

¹ Claim 9 is a Jepson-type claim (see 37 CFR § 1.75(e)), and as such its preamble elements are impliedly admitted to be old in the art. See In re Ehrreich, 590 F.2d 902, 909-10, 200 USPQ 504, 510 (CCPA 1979) and MPEP § 2129. The appellants have not challenged this implied admission. Despite some minor inconsistencies in the terminology employed in claim 9, we understand the admission to encompass a railing assembly wherein a hollow reinforcing tube extends through the interior of each of the balusters.

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respective positions of the appellants and the examiner with regard to the merits of this rejection.

DISCUSSION

The admitted prior art railing assembly set forth in the preamble of claim 9 does not meet the subsequently recited improvement limitations requiring first and second support brackets each including a base portion provided with an aperture, and an annular wall surrounding the aperture and extending from the base portion for receipt of one end of a reinforcing tube.

Katz discloses a support base or bracket 28 for a railing post. The bracket comprises a body portion 30 having an aperture (see Figures 4 and 5), with upstanding side wall portions 44, 46, 56 and 58 surrounding the aperture and defining a socket 60 for receiving the lower end of the post. The side wall portions are orthogonally oriented to give the socket a rectangular cross-section which is complementary to

the rectangular cross-section of the lower end of the post.

In rejecting claims 9 and 10 under 35 U.S.C. § 103(a), the examiner has concluded that it would have been obvious to one of ordinary skill in the art at the time the invention was made "to use the bracket, as taught by Katz, to modify the [admitted] prior art to provide a support bracket that can be readily removed without dismantling the railing and to provide additional strength" (answer, page 3, quoting from the final rejection). In other words, the examiner considers that it would have been obvious "to use a bracket, as taught by Katz, to hold the balusters in the railing assembly of the prior art disclosed in the preamble of the Jepson type claim 9 so as to readily remove a piece of the railing without having to dismantle the railing" (answer, page 5).

The appellants have not disputed the obviousness of this proposed combination of the admitted prior art and Katz. Rather, the appellants in essence contend that the examiner's rejection is unsound because the combination would not meet the limitations in claim 9 requiring the first and second

brackets to each include an annular wall for receipt of one end of the reinforcing tube. In this vein, the appellants submit that

Katz does not disclose nor suggest, Appellants' claimed reinforcing tube 26. Accordingly, it is impossible for Katz to obviate Appellants' claimed structure including an annular wall 24 which defines an aperture for receiving a reinforcing tube 26.

Note that the Katz upstanding wall portions and transverse wall portions 44, 46, 56, and 58 are similar in nature to Appellants' marginal wall 40 which receives the lower end of the baluster 14. However, this is not identical nor equivalent to Appellants' claimed structure, including an annular wall which defines an aperture for receiving a reinforcing tube [brief, pages 4 and 5].

Assuming for the sake of argument that it would have been obvious to use brackets of the type disclosed by Katz to mount the admitted prior art balusters to their top rail and bottom support, it stands to reason that the sockets 60 formed by the upstanding wall portions 44, 46, 56 and 58 would receive the ends of the admitted prior art balusters as well as the ends of the reinforcing tubes extending through the hollow interiors of the balusters. Wall portions 44, 46, 56 and 58, however, do not respond to the limitations in claim 9

requiring the wall on each bracket to be "annular."
Notwithstanding the examiner's apparent finding to the contrary (see pages 5 and 6 in the answer), the wall defined by these wall portions is not "annular" under any ordinary and accustomed meaning of this term.² It is not apparent, nor has the examiner explained, why this difference between the claimed subject matter and the prior art is such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art.

Therefore, we shall not sustain the standing 35 U.S.C. § 103(a) rejection of claim 9, or of claim 10 which depends therefrom, as being unpatentable over the admitted prior art in view of Katz.

² For example, Webster's New Collegiate Dictionary (G. & C. Merriam Co. 1977) defines the term "annular" as meaning "of, relating to, or forming a ring." Although Webster's presents numerous definitions of the term "ring," all of those which are reasonably pertinent to the term "annular" denote an element which has a circular (as opposed to rectangular) configuration.

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SUMMARY

The decision of the examiner to reject claims 9 and 10
under 35 U.S.C. § 103(a) is reversed.

REVERSED

NEAL E. ABRAMS)	
Administrative Patent Judge)	
)	
)	BOARD OF PATENT
CHARLES E. FRANKFORT)	
Administrative Patent Judge)	APPEALS AND
)	
)	INTERFERENCES
)	
JOHN P. MCQUADE)	
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